Rekapacific Bhd v Securities Commission & Anor and Other Appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–845 OF 2002, W–04–151 OF 2002 AND W–02–231 OF 2003
GOPAL SRI RAM, ABDUL AZIZ MOHAMAD AND MOHD GHAZALI JJCA
27 NOVEMBER 2004

Administrative Law — Judicial review — Application for — Discovery — Circumstances where discovery should be allowed in application for judicial review — Rules of the High Court 1980 O 53 r 6

Civil Procedure — Stay of proceedings — Stay pending appeal — Whether applicant would suffer irreparable harm through delisting of company if stay not granted

Rekapacific, a public listed company, was de-listed by the Stock Exchange ('the second respondent in the first two appeals') for alleged breaches of listing rules. It appealed unsuccessfully to the committee of the Stock Exchange and the Securities Commission ('the first respondent in the first two appeals'). Rekapacific then took out an application for judicial review. In the course of the proceedings it applied for discovery of documents and later to interrogate the respondents and to cross-examine the deponents of affidavits delivered in opposition to the application for judicial review. The High Court refused both applications and Rekapacific appealed ('the first and second appeals'). The High Court then granted a stay of the judicial review proceedings pending the first two appeals and the second respondent appealed ('the third appeal').

Held, dismissing the first and second appeals and allowing the third appeal:

(1) Rule 6 of the new O 53 that permits discovery and cross-examination are new enabling provisions. As a matter of procedural history, certiorari and the other prerogative remedies were proceedings on the Crown side of the Queen's Bench Division and were not therefore civil proceedings. The consequence was that at common law, discovery, whether of documents or by way of interrogatories were procedurally not available in an application for prerogative remedies (see para 4).

(2) It was only in very rare cases that either cross-examination or discovery or both should be permitted in judicial review proceedings. This was because questions of fact were rarely in dispute in judicial review proceedings (see para 5).

(3) The only expressly recognised exceptions to this were alleged procedural unfairness or a breach of natural justice; *O'Reilly v Mackman* [1983] 2 AC 237 followed. Upon general principles, discovery should not be ordered unless and until the court was satisfied that the evidence reveals reasonable

grounds for believing that there had been a breach of public duty; and it should be limited strictly to documents relevant to the issue which emerges from the affidavits (see para 10); *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 followed.

(4) Since all relevant material based on which the Stock Exchange arrived at its decision was already with Rekapacific, there was therefore no necessity to order discovery. Second, the further material of which Rekapacific required the Stock Exchange to make discovery related to other companies which were on an objective view of the matter wholly irrelevant to Rekapacific's application for judicial review. Third, it was clear from the passage in the judgment of the trial judge that he adopted the approach recommended by the English authorities when exercising his discretion whether to grant or to refuse the appellant's applications. In these circumstances there was no appealable error in the way in which discretion was exercised. Also, in appeals of this sort, the initial jurisdiction of this court was one of review only and that the court do not have an independent discretion of its own to exercise. It was only after an appellant had established a case for appellate correction that this court became entitled to exercise an independent discretion. That was certainly not the case here. The first and second appeals therefore fail (see para 12).

(5) As regards the third appeal, the judge had misunderstood the nature of the order he was asked to make. He was of the opinion that if a stay of the judicial review proceedings were not granted then Rekapacific would suffer injury through de-listing, which had been stayed pending disposal of the proceedings. But it was not the case of Rekapacific that it would suffer irreparable harm if a stay were not granted. Further, the de-listing of Rekapacific which would take effect if and when it fails in those proceedings would cause it or its shareholders no harm in real terms as it was plainly insolvent. The trial judge was therefore plainly wrong in directing a stay (see para 13).

[**Bahasa Malaysia summary**

Rekapacific, satu syarikat senarai awam, telah disingkirkan dari senarai oleh Bursa Saham ('responden kedua di dalam kedua-dua rayuan yang pertama') perlanggaran peraturan penyenaraian. Ia telah gagal di dalam rayuannya kepada Jawatankuasa Bursa Saham dan Suruhanjaya Sekuriti ('responden pertama didalam kedua-dua rayuan yang pertama'). Rekapacific kemudiannya telah membuat permohonan untuk kajian semula kehakiman. Semasa prosiding ia telah memohon untuk penemuan dokumen-dokumen dan kemudiannya menyoal siasat responden-responden dan memeriksa balas deponen kepada afidavit-afidavit yang diserahkan sebagai bantahan kepada permohonan untuk kajian

semula kehakiman. Mahkamah Tinggi telah menolak kedua-dua permohonan dan Rekapacific telah merayu ('rayuan pertama dan kedua'). Mahkamah Tinggi kemudiannya telah membenarkan penggantungan kepada prosiding kajian semula kehakiman sementara menunggu kedua-dua rayuan pertama dan responden kedua telah merayu ('rayuan ketiga').

Diputuskan, menolak rayuan pertama dan kedua dan membenarkan rayuan ketiga:

(1) Kaedah 6 kepada A 53 yang baru membenarkan penemuan dan pemeriksaan balas adalah merupakan suatu peruntukan baru yang memberi bidang kuasa. Menurut common law, penemuan, sama ada melalui dokumen-dokumen atau interogatori secara prosedurnya adalah tidak didapati di dalam permohonan untuk remedi-remedi yang prerogatif (lihat perenggan 4).

(2) Pemeriksaan balas atau penemuan, atau kedua-duanya, adalah jarang dibenarkan di dalam prosiding untuk kajian semula kehakiman. Ini disebabkan persoalan fakta jarang dipertikaikan di dalam prosiding untuk kajian semula kehakiman (lihat perenggan 5).

(3) Satu-satunya pengecualian yang diiktiraf di dalam perkara ini adalah ketidakadilan prosedur atau suatu perlanggaran keadilan asasi; *O'Reilly v Mackman* [1983] 2 AC 237 diikut. Menurut prinsip-prinsip am, penemuan tidak boleh diarahkan kecuali atau sehingga mahkamah berpuas-hati bahawa keterangan menunjukkan alasan-alasan yang munasabah untuk mempercayai bahawa terdapatnya perlanggaran kepada kewajipan awam, ia sepatutnya terbatas hanya kepada dokumen-dokumen yang relevan kepada isu yang timbul daripada afidavit (lihat perenggan 10); *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 diikut.

(4) Memandangkan kesemua material yang relevan di mana Bursa Saham telah mencapai keputusan ada bersama Rekapacific, tiada keperluan untuk memerintahkan penemuan. Kedua, material yang seterusnya di mana Rekapacific menghendaki Bursa Saham untuk membuat penemuan berkaitan dengan syarikat-syarikat lain yang merupakan pandangan objektif perkara itu adalah tidak relevan secara keseluruhannya kepada permohonan Rekapacific untuk kajian semula kehakiman. Ketiga, adalah jelas perenggan di dalam keputusan hakim bicara bahawa dia telah mengambil pendekatan yang disyorkan oleh autoriti undang-undang Inggeris di dalam menggunakan budi bicaranya sama ada untuk membenarkan atau menolak permohonan-permohonan perayu. Di dalam keadaan ini, tidak terdapat sebarang kesilapan yang boleh dirayu berkenaan cara di mana budi bicara telah digunakan. Juga, di dalam rayuan-rayuan sebegini, bidang kuasa awal mahkamah ini adalah suatu kajian semula sahaja dan mahkamah tidak mempunyai budi bicara yang bebas untuk digunakan. Hanyalah selepas perayu telah membuktikan suatu kes untuk pembetulan rayuan mahkamah

ini berhak untuk menggunakan budi bicara yang bebas. Itu bukan merupakan kesnya di sini. Oleh yang demikian, rayuan pertama dan kedua adalah gagal (lihat perenggan 12).

(5) Berkenaan rayuan ketiga, hakim bicara tersalah faham sifat arahan yang beliau telah diminta untuk membuatnya. Dia telah berpendapat bahawa sekiranya penggantungan kepada prosiding kajian semula kehakiman tidak diberikan Rekapacific akan mengalami kemudaratan melalui penyingkiran daripada penyenaraian, yang digantung sehingga selesainya prosiding. Tetapi itu bukanlah merupakan kes kepada Rekapacific di mana ia akan mengalami kerugian yang tidak dapat dipulihkan sekiranya penggantungan tidak dibenarkan. Seterusnya, penyingkiran daripada penyenaraian oleh Rekapacific yang hanya bermula sekiranya dan apabila ia gagal di dalam prosiding tersebut tidak menyebabkan kerugian kepada pemegang-pemegang sahamnya di dalam erti kata sebenar kerana ia adalah jelas tidak berupaya membayar hutang. Oleh itu hakim bicara adalah jelas salah di dalam mengarahkan penggantungan (lihat perenggan 13).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 162–164.

For cases on stay of proceedings pending appeal, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5582–5586.

For stay of court proceedings, see 13 *Halsbury's Laws of Malaysia* paras [220.019]–[220.041].

Cases referred to

Barnard v National Dock Labour Board [1953] 2 QB 18 (refd)

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (folld)

O'Reilly v Mackman [1983] 2 AC 237 (folld)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199 (refd)

Legislation referred to

Government Proceedings Act 1956 s 2

Rules of the High Court 1980 O 53 r 6

Appeal from: Judicial Revision No R2–34–135 of 2001 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Richard Yeoh with him) (Ranjit Ooi & Robert Low) for the appellant in Civil Appeal No W–02–845 of 2002 and W–04–151 of 2002 and, for the respondent in Civil Appeal No W–02–23 of 2003

N Navaratnam (Brendan Siva and Selena Chow with him) (Kadir Andri Aidham & Partners) for the second respondent in Civil Appeal No W–02–845 of 2002 and W–04–151 of 2002 and, for the appellant in Civil Appeal No W–02–23 of 2003.

Tommy Thomas (Tommy Thomas) for the first respondent in Civil Appeal No W–02–845 of 2002 and W–04–151 of 2002.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] There are three appeals before us. They are Civil Appeal Nos W–02–845 of 2002 ('the first appeal'), W–04–151 of 2002 ('the second appeal') and W–02–231 of 2003 ('the third appeal'). The appellant in the first and second appeals is Rekapacific Bhd ('Rekapacific') while the Securities Commission and the Kuala Lumpur Stock Exchange are the respondents. In the third appeal, it is the Stock Exchange which is the appellant while Rekapacific is the respondent. The facts relevant to all these appeals are as follows.

[2] Rekapacific is a public listed company. It was de-listed by the Stock Exchange for alleged breaches of listing rules. It appealed unsuccessfully to the committee of the Stock Exchange. It also lodged a parallel appeal to the Securities Commission. But that appeal was not considered as the Commission left the matter to be dealt with by the Exchange. Rekapacific then took out an application for judicial review. Several voluminous affidavits were delivered by the parties. Then, in the course of those proceedings it applied for discovery of documents and later to interrogate the respondents and to cross-examine Md Nor Ahmad, the deponent of an affidavit delivered in opposition to the application for judicial review and one Selvarani Rasiah, a person mentioned by Md Nor Ahmad in his affidavit. The High Court refused both applications and this forms the subject matter of the first and second appeals. The High Court then granted a stay of the judicial review proceedings pending these appeals and that forms the subject matter of the third appeal. At the conclusion of the arguments on 22 November 2004, we dismissed the first and second appeals but allowed the third appeal.

[3] In giving our reasons for our decision we think it appropriate to begin by looking at the nub of the learned judge's reasoning for refusing the applications for discovery, the administration of interrogatories and for cross-examination. This is what he said:

> All the interlocutory applications share a common theme. They seek to gain access to information that is not relevant and was not available to and not considered by KLSE during its decision making process leading up to its decision to de-list the securities of the applicant. The fact remains that the documents and information that the applicant seeks largely relate to matters which were not before the KLSE and were therefore not taken into consideration by the KLSE in arriving at the decision to de-list the applicant. Even if these documents are relevant, it is not necessary for the fair disposal of this matter.

[4] The issue before us is whether the learned judge was wrong in adopting the aforesaid approach. Before addressing that question we think it useful to discuss the scope and practical effect of r 6 of the new O 53 that permits discovery and cross-examination. The first point to note is that these are new enabling provisions. As a matter of procedural history, certiorari and the other prerogative remedies were proceedings on the Crown side of the Queen's Bench Division and were not therefore civil proceedings. Section 2 of the Government Proceedings Act 1956 gives statutory recognition of this by excluding applications for prerogative remedies from the definition of 'civil proceedings' in that Act. The consequence was that at common law, discovery, whether of documents or by way of interrogatories were procedurally not available in an application for prerogative remedies. So, we see Denning LJ saying in *Barnard v National Dock Labour Board* [1953] 2 QB 18 that:

> In certiorari there is no discovery, whereas in an action for a declaration there is.

[5] The second point that needs to be made — and made quite emphatically — is that it is only in very rare cases that either cross-examination or discovery or both should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. Of course, if there are any essential or fundamentally important questions of fact that are in serious dispute then the judicial review court would be entirely justified in ordering cross-examination to enable it to make the relevant finding of fact.

[6] The same may be said of applications for discovery. It is now too well settled that where a public law decision is impugned on the ground of '*Wednesbury*' unreasonableness or of proportionality (as is the position in the present instance) it is for the public decision-maker to provide reasons to justify his decision. And where a public decision-maker fails to provide reasons, then the court is entitled to conclude that he has no good reason for making the decision in question. No authority is required for this proposition, but if there is need to cite authority, then it suffices to quote from the judgment of the Federal Court delivered by Abdoolcader SCJ in *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 where his Lordship said:

> The scope of judicial review is narrower and limited and it would be useful and apposite to reproduce *in extenso* the delightfully lucid and comprehensive exposition on this aspect by Lord Denning MR, in *General Electric Co Ltd v Price Commission* [1975] ICR 1, 12 (at p 12) when he stresses the supervisory nature of the jurisdiction:
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> > Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a re-hearing of the matter: see *Healey v Minister*

of Health [1955] 1 QB 221. But, nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *Re HK (An Infant)* [1967] 2 QB 617, 630 and *Reg v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1007, 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding — so unreasonable that a reasonable person would not have come to it — then again the courts will interfere: see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. If the decision-making body goes outside its powers, or misconstrues the extent of its powers, then, too, the courts can interfere: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v Campbell* [1925] AC 338. *In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons — in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly*: see *Padfield*'s case [1968] AC 997, 1007, 1061.

[7] Since it is for the public decision-maker to give reasons for his decision, it is open to a court for the just disposal of a judicial review application to require the decision-maker to make discovery of the material on which he based his decision. This would assist the court to determine whether any reasonable person similarly circumstanced as the decision-maker in question would have acted in like fashion.

[8] Further, the general rule as to interrogatories is that:

> Although interrogatories must be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. (See *Marriott v Chamberlain* (1886) 17 QBD 154; *Osram Lamp Works Ltd v Gabriel Lamp Co* (1914) 2 Ch 129). In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs (per Gill CJ (Malaya) in *Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89).

[9] In an application for judicial review, the 'matters which are in issue' and 'facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue' are *ex necessitae rei* confined to

the grounds of review set out in the judgment of Lord Denning quoted in para 6 of this judgment. And those are all matters which may, and in the vast majority of cases, must, be disposed of without the aid of discovery.

[10] The current practice in England after the amendment to their O 53 is set out at pp 254–257 of Richard Gordon's work *Judicial Review and Crown Office Practice* which is the *locus classicus* on the subject:

Cross-examination

> Formerly it was exceptionally rare for applications to be made, or leave granted, for cross-examination in judicial review proceedings. In *O'Reilly v Mackman* [1983] 2 AC 237 however, Lord Diplock, at pp 282–283, took the opportunity to emphasise that:
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> > Whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons, it should be allowed whenever the justice of the particular case so requires.
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> Notwithstanding the generality of this statement there have been indications (both pre and post *O'Reilly v Mackman*) that the court will be slow to permit cross-examination under O 53. Note, for example, the comments of Watkins LJ in *R v Jenner* [1983] 1 WLR 873 as to the unsuitability of judicial review for assessing questions of fact. For rare cases where cross-examination has been allowed see: *R v Waltham Forest LAC, ex p Baxter* [1999]QB 419; *R v Derbyshire CC, ex parte The Times Supplements* [1991] COD 129.
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> In *George v Secretary of State for the Environment* (1979) 77 LGR 689, Lord Denning MR observed that it would only be upon rare occasions that the interests of justice would require that leave to cross-examine be given. There were similar dicta in *R v Inland Revenue Commissioners, ex p Rossminster Ltd* [1980] AC 952 at 1027, and *R v Board of Visitors of Albany Prison, ex p Fell* (unreported 8 July 1981). In *R v Home Secretary, ex p Khawaja* [1984] AC 74 it was said that the interests of justice would rarely require the attendance of an overseas deponent for cross-examination. In *R v Home Secretary, ex p Patel* (1986) Imm AR 208 Webster J deprecated the use of cross-examination of witnesses who needed an interpreter or whose first language was not English (his decision was upheld at (1986) Imm AR 515).
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> Even in *O'Reilly v Mackman* Lord Diplock qualified the effect of his observations by indicating that the nature of the issues that normally arise on judicial review rarely requires cross-examination. The only expressly recognised exceptions to this (see [1983] 2 AC 237 at 282) were alleged procedural unfairness or a breach of natural justice. He warned that:
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> … the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards v Bairstow* [1956] AC 14, 36; and to allow cross-examination presents the

court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament … .

These dicta, whilst rightly underlining the essence of the review process, appear to posit a somewhat narrow test for the exercise of the court's discretion to allow cross-examination. It is possible to envisage other situations where, applying Lord Diplock's test, the justice of a particular case may require cross-examination. In particular a conflict of evidence on the affidavits before the court may need to be resolved in order to investigate the factors affecting a decision and whether there has been an abuse of discretion. See eg the observations of Woolf J in *R v Home Secretary, ex p Rouse and Shrimpton* (unreported, 13 November 1985). Contrast, though, *R v Reigate JJ, ex p Curl* [1991] COD 66 where it was held that disputes as to events in magistrates' courts did not generally make cross-examination desirable.

Discovery and inspection

Parties seeking discovery and inspection of documents may experience more difficulty than in an ordinary action, notwithstanding the incorporation of O 24 into judicial review proceedings.

Whereas in most actions discovery occurs automatically under O 24, rr 1 and 2 there is no inherent right, in applications for judicial review, to orders for discovery or inspection.

The retention of control by the court may indicate that such orders will be more difficult to obtain in cases under O 53. Certainly this was the view of the Court of Appeal in *R v Secretary of State for the Home Office, ex p Harrison* (unreported, 10 December 1987) where it was stated that on an application for judicial review discovery would be appropriate in fewer cases and was likely to be more circumscribed.

In general, the following principles appear to govern the grant or refusal of discovery under O 53:

(a) Discovery will not be ordered so as to make good defects in the applicant's evidence (*R v Inland Revenue Commissioners, ex p Taylor* [1988] 1 COD 61; *R v Secretary of State for Education, ex p J* [1993] 1 COD 146; *R v Inland Revenue Commissioners, ex p National Federation of Small Employed and Small Businesses Ltd* [1982] AC 617 at p 635H).

(b) One will seldom obtain full private law type discovery in a *Wednesbury* challenge (*R v Secretary of State for the Environment, ex p Smith* [1988] COD 3).

(c) By contrast, discovery will be ordered under O 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter (within the meaning of O 24 r 8) (see *R v Inland Revenue Commissioners, ex p J Rothschild Holdings Plc* [1987] 1 STC 163; *R v Governor of Pentonville Prison, ex p Herbage (No 2)* [1987] 1 QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the

> contents of the affidavits were not accurate (*Re H*, The Guardian, 17 May 1990). By contrast, discovery will not be ordered where there is no reason to doubt the bona fides or accuracy of the reasons given on affidavit (see *R v Secretary of State for the Environment, ex p Islington LBC* [1992] COD 67; *R v Secretary of State for Health, ex p LB of Hackney* [1994] 1 COD 432).

The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 654. In relation to discovery under O 53 he indicated that:

> … Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty; and it should be limited strictly to documents relevant to the issue which emerges from the affidavits.

The second limb of this statement is unexceptionable. It is a guiding rule that discovery and inspection must be restricted to matters relevant to an existing dispute. Indeed, in judicial review proceedings it has been held that discovery must be central to the application (see *R v Secretary of State for the Home Department, ex p Benson* [1989] COD 329).

It is, however, questionable whether, as a preliminary requirement, the court must attempt an evaluation of merits. Interlocutory relief will be granted only after leave has been given to apply for judicial review. In that sense therefore an applicant seeking discovery has, *ex hypothesi*, an arguable case for asserting a breach of public duty. In *R v Secretary of State for Transport, ex p ABH Road Safety Ltd* [1993] COD 150, Schiemann J left open the possibility that, in an appropriate case, the grant of leave in judicial review may sometimes be taken to establish a prima facie ground of irrationality, thereby justifying an order for discovery. Certainly, following the grant of leave it is difficult to see what else the court can do when considering discovery/inspection beyond determining whether potentially discoverable documents are relevant to the issues between the parties.

Given the two-stage procedure under O 53 it may be that Lord Scarman was merely emphasizing the overall hurdles to be surmounted before discovery could become available. Even if these hurdles are surmounted the doctrine of public interest immunity would appear to have more scope, having regard to the nature of judicial review, as a means of opposing an order for discovery in O 53 proceedings.

[11] We are of the view that the restraint suggested by Lord Diplock in *O'Reilly v Mackman* in relation to ordering cross-examination and that suggested by Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* in relation to making an order for discovery should be adopted by our courts when dealing with applications for these interlocutory reliefs in the course of an application for judicial review.

[12] Returning to the present instance, we would make the following observations. First, this is a case in which all relevant material based on which the Stock Exchange arrived at its decision is already with Rekapacific. There

is therefore no necessity to order discovery. Second, the further material of which Rekapacific requires the Stock Exchange to make discovery relates to other companies which are on an objective view of the matter wholly irrelevant to Rekapacific's application for judicial review. Third, it is clear from the passage in the judgment of the learned judge already quoted that he adopted the approach recommended by the English authorities when exercising his discretion whether to grant or to refuse the appellant's applications. In these circumstances we are unable to discern any appealable error in the way in which discretion was exercised here. It must not be forgotten that in appeals of this sort, the initial jurisdiction of this court is one of review only and that we do not have an independent discretion of our own to exercise. It is only after an appellant has established a case for appellate correction that this court becomes entitled to exercise an independent discretion. That is certainly not the case here. The first and second appeals therefore fail.

[13] As regards the third appeal, it has been amply demonstrated by the appellant therein that the learned judge misunderstood the nature of the order he was asked to make. Hence we find him saying that if a stay of the judicial review proceedings were not granted then Rekapacific would suffer injury through de-listing, which has been stayed pending disposal of those proceedings. But it was not the case of Rekapacific that it would suffer irreparable harm if a stay were not granted. Further, the de-listing of Rekapacific which will take effect if and when it fails in those proceedings would cause it or its shareholders no harm in real terms as it was plainly insolvent. Put another way, the shareholders of Rekapacific would suffer no loss of their investment by reason of the de-listing. The learned judge was therefore plainly wrong in directing a stay.

[14] Before we conclude we must say in fairness to counsel for the appellant in the first and second appeals that as he began presenting his case, it became fairly obvious that his client's complaints relate to unfair treatment by the respondents to those appeals. As we have already said, the nature of learned counsel's case is that the decision made by the second respondent is one which no reasonable public decision-maker would make. Even a cursory perusal of the voluminous affidavits and exhibits delivered in this case show that the appellant has more than sufficient material to advance its case on the merits. But we must not, by our comment, to be taken as saying that the appellant will succeed on the merits of its application for judicial review. It may not. All that we are saying is that there is adequate material on which the appellant in the first and second appeals may proceed without the necessity of cross-examination or discovery.

[15] For the reasons already given, the first and second appeals were dismissed and the third appeal was allowed. The respondents in the first and second appeals were awarded the costs of those appeals but with the rider that only one item of getting up was to be permitted by the taxing registrar.

As for the third appeal, this was allowed with costs. The appropriate orders as to the deposits in court were made.

[16] My learned brothers Abdul Aziz bin Mohamad and Mohd Ghazali bin Mohd Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.

First and second appeals dismissed. Third appeal allowed.

Reported by Loo Lai Mee